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Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

STEVENS READY-MIX CONCRETE COMPANY,
PETITIONER

VERSUS

OKC CORPORATION,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1.

Whether the court below was correct in their interpretation of duress vitiating a contract under Louisiana law.

2.

Whether the higher prices in conflict with the contractual provisions have been ratified under Louisiana law, by failure to seek judicial remedy earlier.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not reported and appears in the Appendix A hereto. The opinion rendered by the United States District Court for the Middle District of Louisiana appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 8, 1984. This petition for certiori was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC 1254(1).

STATUTORY PROVISIONS INVOLVED

Louisiana Civil Code Article 1850: "Consent to a contract is void, if it be produced by violence or threats, and the contract is invalid".

Louisiana Civil Code Article 1851: "It is not every degree of violence or every kind of threats that will invalidate a contract; they must be such as would naturally operate on a person of ordinary firmness, and inspire a just fear of great injury to person, reputation or fortune. The age, sex, state of health, temper and disposition of the party, and other circumstances calculated to give greater or less effect to the violence or threats, must be taken into consideration".

EXISTENCE OF JURISDICTION BELOW

This case was originally heard by the United States District Court, Middle District of Louisiana. The plaintiff is a Delaware corporation with its principal place of business in the State of Texas. Defendant is a Louisiana corporation with its principal place of business in Louisiana. The amount in controversy exceeds $10,000.00, exclusive of interest and costs. Jurisdiction in U.S. District Court was based on 28 U.S.C. 1332. Jurisdiction in the U.S. Fifth Circuit was based on 28 U.S.C. 1291.

STATEMENT OF CASE

On February 3, 1975, OKC and Stevens entered into a contract whereby Stevens agreed to give OKC all of their cement business, and OKC agreed to supply all of Stevens' needs at a price which would not increase by more than $3.00 per ton for any single calendar year. (Stevens-Exhibit 3, Tr. pp. 32,44,46,47) In the terms used in the meeting between the parties, Stevens and OKC were "married". (Tr. p. 47) OKC started and continued to be the sole supplier of cement to Stevens from this time through 1980. (Tr. p. 46) The relationship of the parties continued unimpeded through the year 1977 as

evidenced by miscellaneous memorandums and supplies made during the years 1975, 1976 and 1977. During those years OKC and Stevens would agree on a set price for the year, which was never more than the $3.00 per ton per year maximum, and frequently was less. (Stevens Exhibit 3,4,5,6, Tr. p. 48-51, 53-55) During the year 1977 the parties were proceeding on the specified prices agreed to for that year. (Tr. p. 54, 55, Stevens Exhibit 9) On July 20, 1977, representatives of OKC, principally Mr. Cloyce Box, Chairman of the Board of OKC, met with representatives of Stevens and OKC stated they would no longer honor their contract with regard to the $3.00 per ton per year price increase ceilings under which the parties had been operating and that the parties would be governed by new prices which were dictated by OKC on a take-it-or-leave-it basis. (Tr. p. 55-57) Mr. Box indicated that he would hold

the line with regard to a specific job that Stevens was pouring the concrete on for the Mississippi River Bridge being constructed at Luling, Louisiana. (Tr. p. 58) In lieu of Stevens acdpting this, OKC basically indicated that they would not supply any cement for any job, including the Luling job. (Tr. p. 62) The implicit threat in the discussions was that if Stevens did not agree to abrogate the contracts with regard to all of their other cement needs, their supplies of cement would be cut off for all of their needs, including the Luling, Mississippi River Bridge job. Stevens did not assent to this change and merely listened to the discussion, but the changes dictated by OKC at this meeting were included in a letter which was sent to Stevens on July 22, 1977. (Tr. p. 57) At this time, Stevens was the sole concrete supplier of the substructure of the Mississippi RiverBridge job at Luling, Louisiana and the penalties involved were

enormous. (Tr. p. 63,64,127) Disruption of this project would have subjected Stevens to ruinous fines and damages which would have run them out of business. If Stevens had had to pay the increase in prices, they would have lost $250,000 to $500,000. If they had shut down the job looking for cement it would have cost in excess of $10,000 to $15,000 per day in damages. (Tr. p. 63,64,127) Additionally, Stevens had committed itself to numerous other projects in reliance upon OKC's previous agreements. Stevens failure to submit to OKC's demand would have caused disruption of the supplies to these projects and had severe consequences for Stevens. (Tr. p. 58) Stevens could not obtain cement from any other source at this time. (Tr. p. 58-61) As a result, Stevens was forced to acquiesce in these price increases, although not agreeing to them, because of the dire financial circumstances that would have

affected them because of the fact that they could not obtain concrete supplies from any other source at this time. The testimony in the trial is unrebutted that Stevens could not have obtained cement supplies from any other source at this time. It is significant to note that the only testimony of OKC was not of any officer of OKC rebutting the contentions of Stevens, and not of Mr. Box rebutting the testiony of Mr. Stevens with regard to their situation, but only of an expert who attempted to testify as to the general concrete situation during the year 1977, and whose testimony showed that there was no way that the normal cement supplies of Stevens Ready-Mix could have supplied Stevens' concrete needs during the year 1977 and 1978. It should be particularly noted that Mr. Box sat in the courtroom during the entire trial and did not rebut one single fact testified to by Stevens' witnesses.

From August, 1977 through October, 1980

Stevens was overcharged in the amount of $555,431.17. This amount is determined by subtracting the maximum amount chargeable under the contract containing a $3.00 per ton per year maximum escalator provision from the amount actually charged for the cement supplied during this period. This figure was stipulated by the parties. (Stevens Exhibit 1)

ARGUMENT

QUESTION 1

Whether the court below was correct in their interpretation of duress vitiating a contract under Louisiana law.

Article 1819 of the Louisiana Civil Code provides that "there is no consent . . . where it has been produced by . . . violence, threats", and Article 1850 of the Louisiana Civil Code provides that "consent to a contract is void, if it be produced by violence or threats, and the contract is invalid." Article 1855 of the Louisiana Civil Code provides that "no contract can be invalidated on an allegation of violence or threats, if it has been approved, either expressly after the violence or danger has ceased, or tacitly by suffering the time limted 'for prescription' to elapse without causing it to be rescinded."

Louisiana jurisprudence recognizes economic duress as a vice of consent. For example, see New Orleans and N.E.R. Co. vs. Louisiana Construction & Supply Co., 109 La. 13 So. 51 (La. 1902).

Article 1850 of the Louisiana Civil Code, providing that a contract is invalid if the consent is void, states the law of Louisiana, and further specifically addresses the economic situation found in New Orleans and N.E.R. Co. vs. Louisiana Construction & Supply Co., supra, where the court stated:

> "The distinction to be made between payments voluntary and payments made under duress has been a fruitful theme of discussion in the courts. Where thee parties were not on equal terms; where the payor had no choice; where the only alternative was to submit to an illegal exaction or discontinue business--these and other like circumstances evidencing pressure or duress under which money or other values parted with, have never been regarded as embraced within the rule of voluntary acts within the meaning of the maxim 'volentii non fit injuri'."

When passing on the validity of a state statute, the Supreme Court considers itself bound by whatever interpretation the statute has received in the local state court. State of Minnesota v. Probate Court, 309 U.S. 270, 60S.Ct. 523(1940).

At the time when OKC refused to honor its' agreement and demanded the increased prices, Stevens was certainly unable to deal with them on equal terms. First there was a severe shortage of cement supplies at this time. "... the supply of cement in the Baton Rouge market area began to shrink...it got down to the point that it was quite critical. They had a lot of customers on allocation... I have several competitors who were doing business with some other cement suppliers and they would be closed one and two days a week for lack of cement during the summer and fall of 1978." (Roland Stevens, Jr.; Tr. p. 61) In 1977 cement producers in Louisiana and Mississippi were operating at full capacity

and still only able to produce half the cement being consumed. (Queen, Tr. p. 203) Evidence in this case demonstrates that during the relevant time period, 1977-1980, cement was a seller's market. OKC would have little difficulty selling the cement to companies other than Stevens and Stevens would find it difficult, if not impossible to find dependable supplies of the cement it needed.

Stevens Ready-Mix Concrete Company did attempt, unsuccessfully, to tap other sources of cement during this period (Tr. p. 60) but none of the companies contacted had any extra cement.

This is not to imply that it would be totally impossible to procure cement, just that a reasonable person in Stevens' shoes would not have been successful. Certainly if Stevens had had infinite financial resources they may have been able to get cement from

somebody. It may also have been possible for someone in an established cement importing business to have located some foreign supply to import. Stevens was not a cement importer but a supplier of Ready-Mix Concrete to end users. It would be unreasonable and economically impossible to expect Stevens to enter an entirely new type of business enterprise because the supplier who had contracted to supply cement has suddenly refused to honor that contract unless Stevens submitted to the higher prices dictated. For a reasonable person in Stevens' shoes, i.e., not having infinite resources and not in the cement importing business, there were no alternatives to OKC's cement supplies short of bankruptcy.

Even if an alternative source of cement had been found, this would have done little to improve Stevens' bargaining position. Stevens had been buying from OKC for two and a half years before the July 1977 meeting.

They had let out a number of large contracts in reliance on their agreement with OKC (Tr. p. 58-59). Once the jobs were started, it is difficult and expensive to get the architects and engineers to permit you to swap cement companies because of color differentials, mix designs, etc. (Tr. p. 46). These were multi-year projects and Stevens bid on them on reliance upon the agreement with OKC that the price would not increase more than $3.00 per year. (Tr. p. 45) The $3.00 price escalator cap was of extreme importance to Stevens in their ability to bid on projects and was a primary inducement for them to make the original contract "marrying" OKC. (Tr. p. 46-47)

Another major source of duress eliminating Stevens ability to bargain with OKC voluntarily was the contract Stevens had as the sole concrete supplier for the Mississippi River Bridge at Luling,

Louisiana. Disruption or discontinuance of concrete in this fifty million dollar project would subject Stevens to penalties in excess of $15,000.00 per day. OKC was the only supplier of the type of cement which had been approved for this job. OKC agreed to continue their agreement in regards to the Luling project if Stevens agreed to the price increases. Although it was never explicitly stated that OKC would halt supplies to Luling if the price increases were not accepted, this threat was certainly obvious. Stevens was admittedly "... caught flat footed..." by OKC's renigging on their original agreement (Tr. p. 59). OKC indicated to Stevens that they were not going to ship the cement if Stevens did not pay the price increases (Tr. p. 62). At the July meeting, OKC representatives told Roland Stevens, Jr. that they would not honor the original agreement.

Roland Stevens, Jr. was justifiably

afraid that if he refused to pay the higher price, OKC would cut off all their supply of cement including that needed for the Luling Bridge project. With the severe shortage of cement, resulting in Stevens being unable to get cement supplies from other companies, this would have meant the financial ruin of Stevns Ready Mix Concrete Company.

In addition, the cement supplied by OKC was the only type of special mixture which would meet the requirements of the bridge job and the only supply which had been tested and approved for other jobs for which Stevens was committed. Even if Stevens had been able to locate another source it would have caused dire economic consequences to change suppliers due to the disruption in jobs because of time delays and the need for getting architectural and engineering approval before the cement could be used.

It is significant to note that OKC did

not present one witness to counter the testimony of Stevens as to the existence of the contractual obligations, or to counter the allegations by Stevens that they had to consent under duress. Cloyce Box, who was at the July 1977 meeting, is still Chairman of the Board and President of OKC Corporation. Cloyce Box could easily have testified that Stevens had no problems and that he would have continued to supply the bridge job. Cloyce Box sat in the courtroom during the entire trial. His failure to testify results in the presumption being applied that his testimony would be adverse to OKC.

In New Orleans & N.E.R. Company vs. Louisiana Construction and Supply Company, 109 La. 13, 33 So. 51 (La. 1902), the Louisiana Supreme Court found that when you have someone who is facing economic duress, a threat of going out of business, and is on unequal bargaining power with someone else, the consents given in those cases are under

duress, invalid, and damages can flow from breaches by the party dealing from severe economic power. That is exactly the situation which Stevens found itself in; being unable to supply cement from another source; facing a disruption in supply because of delays existing even if it could get cement meeting the specifications; having OKC as the only supplier of certain types of cement being used in those jobs; and facing damages in excess of $15,000.00 per day if they did not agree to the new terms. Clearly this is economic duress.

QUESTION 2

Whether the higher prices in conflict with the contractual provision have been ratified under Louisiana law by failure to seek judicial remedy earlier.

Stevens could have approved a price increase had there been no duress or after such duress had ceased. In this case,

however, the duress to Stevens, their inability to obtain cement from other sources, together with the other before-mentioned problems continued throughout much of the period, however, so there was no way that Stevens could have approved of the changes significantly before the period ended.

Louisiana Civil Code Article 1926 provides that a party to a contract which has been breached is entitled to damages, and in some cases to specific performance at his option. Tiorn vs. Housing Authority of City of Opelousas, 393 So.2d 1267, enforces this option and states that there is no requirement that a party choose between specific performance and damages with regard to the breach of a contract.

Therefore the law of Louisiana is that a party need not choose one remedy over the other but may decide at his option which

remedy he would like to pursue.

Eames vs. McKnight, 251 So.2d 491, affirmed, 265 So.2d 220, specifically held that a failure to demand specific performance of a contact does not preclude or forfeit the right to recover damages. Golden Cycle Mining Company vs. Parson Coal Mine, 188 Fed. 179, held that the parties in Louisiana could sue at once for damages or wait until performance should have been completed. Dewenter vs. Mott, 27 So.2d 444, held that a suit for specific performance filed three years after the facts giving rise to the suit was not an unreasonable delay so as to preclude specific perfomrance. Rauter vs. Rauter Succession, 206 La. 474, 19 So.2d 209, held that a suit filed four and a half years after the facts giving rise to the breach of contract was timely. Rauter vs. Rauter Succession, supra, further specifically held that specific performance could not be denied on the ground that plaintiff had remedies at

law and waited for several years to determine whether the stock increased or decreased in value. Cognevich vs. Balazio, 159 La. 1019, 106 So. 550, provided that a suit for specific performance four years after a contract for exchange of property was made did not come too late.

The cases cited above clearly show that Stevens was not obligated at the time to take legal action, particularly where the result of that legal action would have been them putting themselves in the exact situation they were trying to avoid, i.e., defaults on the contracts and jobs which they had. A suit at that time would have resulted in them losing their supply of cement with Stevens facing the economic consequences.

Even a court victory for Stevens in these circumstances would have been a shallow victory indeed. Stevens faced breach of a multi-million dollar contract almost

immediately if OKC stopped supplying concrete. (Tr. p. 63-34) Regardless of who prevailed in court, both financially and as to reputation, Stevens would have been ruined. It would be little consulation that by court victory Stevens may have been able to force OKC into an early bankruptcy as well. Stevens then attempted to minimize their loss without default and paying the higher prices. The cases above clearly show that Stevens was not obligated to file suit at that time and the four year delay resulting was certainly not unreasonable and has been allowed by the Louisiana courts previously.

The cases do not hold that a party must resort to specific performance. Specifically, in Oliver vs. Home Service Ice Company, 161 So. 766 (1935), previously cited in support of OKC's position, the court held that overcharges paid by a party to a contract could be recovered by that party, as damages, after the payments had been made.

Plaintiff claimed that they had a contract to purchase ice at a stated price but the defendants increased the price. Defendants paid the increased price, and, without an indication of protest, later filed suit to both have the price changed back and to recover the sums overpaid. The court refunded the overpayment and also granted an injunction for specific performance. Additionally, a specific allegation was made in Oliver that the plaintiffs were buying ice from somewhere else, whereas in this case the evidence will indicate that Stevens could not buy from anyone else.

OKC and Stevens were in a situation where they were dealing from unequal positions; Stevens had no choice but to consent, under duress, in lieu of going out of business. During the period of time that this duress continued, Stevens could not raise the problem without suffering the same

consequence, i.e. having the supply of cement shut off. It was only after the duress ended that Stevens had the practical alternative of filing suit. There is no time limit required, except for the prescriptive contractual provisions of ten years, limiting Stevens' action. Stevens properly filed an action for damages in 1981 and was not rquired to do so in 1979 or 1980.

The District Court cited the cases of Stupp Corporation v. Con-Plex, Division of U.S. Industries, 344 So.2d 394 (La. App. 1st Cir. 1977), Ceco Corporation v. Mid-Gulf Construction, Inc., 396 So.2d 474 (La. App. 4th Cir. 1981), and Benglis Sash & Door Co. v. A.P. Leonards, 387 So.2d1171 (1980), as cases showing that Stevens agreed to the new prices. None of these cases involved any duress in giving consent. Stupp, supra, was found by the court to be a misunderstanding between the parties as to which provision of their individual contracts they agreed to;

they found no original contract, and no meeting of minds. In CECO, supra, there was no duress and no showing that the steel involved in that case could not have been obtained by another source. Benglis, supra, merely follows Stupp, supra, in having the court decide upon a price when the parties had not agreed upon one originally.

Louisiana Civil Code Article 1930 provides that the party who violates the obligations of a contract is liable to the payment of damages which the other party has sustained. Louisiana Civil Code Article 2516 provides that damages rsulting from the non-execution of a contract of sale shall be decided by the general rules established under the title: "Of Conventional Obligation", which is Civil Code Article 1930 paraphrased above. Neither requires a party to sue for specific performance but to the contrary specifically provides that a party

may sue for damages.

OKC had obligations to supply cement with a maximum price increase of $3.00 per ton per year. Under duress they were forced to pay more than $3.00 per ton per year and Stevens' Exhibit No. 1, stipulated to by the parties, shows the monetary amount of Stevens' damages. If the maximum amount they should have had to pay under their contract is subtracted from the actual amount they were forced to pay, we find that Stevens was overcharged and thus damaged to the extent of $555,431.17.

CONCLUSION

This court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 83-3538
Summary Calendar

OKC CORPORATION,

Plaintiff-Appellee
Cross Appellant,

versus

STEVENS READY MIX
CONCRETE COMPANY,
Defendant-Appellant
Cross Appellee.

Appeals from the United States District Court for the Middle District of Louisiana

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(March 8, 1984)

Before REAVLEY, RANDALL and WILLIAMS,

Circuit Judges.

PER CURIAM:

Appellee, OKC Corporation, sued to recovery the purchase price of cement sold

and delivered to appellant, Stevens Ready Mix Concrete, from August 24, 1980, to October 16, 1980. Jurisdiction in the federal court was based upon diversity of citizenship, 28 U.S.C. Sec. 1332. The district court awarded judgment for the plaintiff-appellee for the $71,336.51. We affirm.

Appellant justifies its failure to pay for the cement on the ground that appellee breached its contract to supply cement to appellant by forcing appellant under duress in 1977 to agree to a price increase substantially above the $3.00 per ton per year to which the parties had agreed in an earlier contract. Appellant, therefore, counterclaimed in the amount of $555,431.17 as excess charges upon cement purchased from appellee from August 1977 until October 1980, the excess being over the purchase price of a raise of $3.00 per ton per year under the earlier contract reached between the parties.

Appellant claims duress under Louisiana law, Article 1850, La. Civ. Code, on the ground that when appellee demanded a price increase in excess of $3.00 per ton in 1977, appellant could not refuse to agree to the increase because of its commitments under construction contracts. Further, appellant urges that it was not required to protest at the time it first began to purchase the cement at the higher cost, and further it was not required to file suit for specific performance immediately but could wait and file suit for damages as it has in its crossclaim.

The district court found in a trial without a jury that appellant's agreement and undertaking to purchase the cement at the increased price did not constitute duress within the meaning of the Louisiana Code. The court found that at best only desultory attempts were made by Stevens to discover

alternative suppliers of cement. Further, Stevens, knowing the circumstances that OKC had suffered a devastating explosion to its production facilities, had not protested when originally approached to pay an increase above the $3.00 maximum. OKC in the negotiations did agree to supply all the cement necessary for appellant to complete a major construction project then being carried out because appellant had already bid on the project with the lower cement price in mind. Finally, the district judge relied upon the additional fact that a later contract at the higher price was signed by Stevens even after a nationwide shortage of cement had been alleviated and cement could have been purchased from other sources.

In reaching the conclusion that appellant cannot claim duress in the price increases beginning in 1977, the district court effectively considered and evaluated a number of Louisiana cases decided under the

Louisiana Civil Code. This Court properly gives great deference to a district judge's interpretation of the law of his own state. Trahan v. First National Bank of Ruston, 690 F.2d 466, 468 (5th Cir. 1982); Cole v. Elliott Equipment Co., 653 F. 2d 1031, 1034 (5th Cir. 1981). Further a careful review of the record reveals no findings of fact which are "clearly erroneous". Fed.R.Civ.P. 52(a); Williamson v. Brown, 646 F.2d 196, 200 (5th Cir. 1981). We do not find the district court in error in concluding that appellant failed to carry the burden of proving that it acted under duress in acceding to the higher price for cement in 1977 and the following years.

We also affirm the holding of the district court that these sales took place under contract and not under "open account". Thus, the court was correct in concluding that appellee OKC was not entitled under

Louisiana law to attorney's fees in addition to the judgment for the cement sold but not yet paid for.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

OKC CORPORATION

VERSUS

STEVENS READY MIX CONCRETE

CIVIL ACTION

NO. 81-323-A

J U D G M E N T

For the written reasons assigned and filed herein:

IT IS ORDERED ADJUDGED AND DECREED that there be judgment entered herein in favor of plaintiff, OKC Corporation, and against defendant, Stevens Ready Mix Concrete, in the sum of $71,336.51 with legal interest thereon from October 16, 1980, until paid.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that the counterclaim of the defendant is hereby DISMISSED.

Baton Rouge, Louisiana, August 3, 1983.

S/JOHN V. PARKER
CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

OKC CORPORATION

VERSUS

CIVIL ACTION
NO. 81-323-A

STEVENS READY MIX CONCRETE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, a concrete supplier, sues to recover the purchase price of concrete sold and delivered to the defendant from August 24, 1980 to October 16, 1980. The concrete was delivered as a result of a series of contractural agreements between the parties which the plaintiff contends were tacitly accepted by defendant. Plaintiff also claims attorneys fees under La. R.S. 9:2781. Defendant denies that it is obligated to pay the full amount demanded by plaintiff and counterclaims for alleged overcharges. Jurisdiction is based upon diversity of citizenship under 28 U.S.C. Sec.1332.

FINDINGS OF FACT

1) Plaintiff is a Delaware corporation with its principal place of business in the State of Texas. Defendant is a Louisiana corporation with its principal place of business in that state. The amount in controversy exceeds $10,000.00, exclusive of interest and costs.

The parties have stipulated the following facts:

2) That invoices introduced into evidence correctly reflect the prices and quantities of cement shipped to Stevens during the period from May, 1977 until October 16, 1980. (OKC-2). That a demand letter, dated March 25, 1981, shows the correct balance owed by Stevens to OKC as of October, 1980 in which the amount is stated to be $71,336.51. That the demand letter was received by Stevens and payment was not made within 30 days. That summary of OKC's records

accurately shows the amounts paid from August, 1977 until October, 1980 and also lists the price totals charged at lower prices than those later demanded by OKC. The Court Finds the Following Facts:

3) From approximately 1973 until October, 1980 OKC, through Louisiana Cement, sold large quantities of cement to Stevens. A specific "work sales contract" between the parties, dated February 3, 1975, specifies that the price per ton was to be $33.60. The contract also provides that the price will remain in effect until December 31, 1975, and that in no event will an increase after that date exceed $3.00 a ton in any one calendar year. There were subsequent transactions between the parties according to the contractural provisions and on January 21, 1977, OKC and Stevens agreed that OKC would supply all of Stevens' concrete needs for 1977 at a price of $35.00 per ton rail delivery, $36.00 per ton truck delivery subject to a

$1.00 per ton discount for prompt payment. The letter in which the agreement is detailed staes that a specific "work sales contract" is attached and which will provide the agreement between the parties. The contract is not attached.

4) Until July of 1977, the relationship between the parties proceeded amicably. At that time an explosion occurred at the Louisiana Cement facility in New Orleans which forced OKC to procure out of state cement in order to fill its orders.

5) During the years of 1975-1976, the industry experienced the effects of a recession and prices were "cut rate". In addition, there was a surplus of cement available at that time.

6) In 1977 there was apparently a nationwide shortage of cement which did not ease until late 1978 or early 1979. By 1980, cement supplies were again plentiful.

7) As a result of the explosion and the general marketplace trends, OKC found that it would be required to procure cement at a higher price than in previous years.

8) OKC first warned its customers of possible price escalations in a letter dated July 6, 1977.

9) Cloyce Box met with representatives of Stevens on July 20, 1977 in order to discuss a price escalation in excess of three dollars a ton caused by the increased price of out of state cement purchases. Stevens agreed to OKC's proposal and on July 22, 1977, Mr. Box sent a letter to Stevens to confirm the agreement.

10) From July 20, 1977 until August 24, 1980, Stevens accepted delivery and paid for cement according to the compromise reached by the parties at the July meeting.

11) From August 24, 1980 to October 16, 1980, OKC shipped and Stevens accepted large quantities of cement for which Stevens

refuses to pay.

12) Stevens entered a specific work contract with OKC on April 1, 1980, which calls for delivery of cement at a rate of $55.40 per ton,

13) The price increases not applicable to cement supplied for a specific bridge construction project performed by Stevens at Luling, Louisiana.

14) Roland Stevens, Jr. denies that he agreed with Box to the price increases in July, 1977, but explains his failure to protest by stating that he "had nowhere else to go" since cement was in short supply. Stevens admits that he could have located other cement supplies had he been willing to pay prices sufficiently high to meet their demands. Stevens states that he did not protest Box's proposal for fear of aggravating Box, causing a price increase on the Luling job or being denied cement

altogether.

15) Stevens also justified his silence by claiming that he felt pressured to continue to purchase cement from OKC in order to maintain consistency in the color of the cement used on current construction. Notwithstanding Stevens concerns, he was aware that OKC was forced to purchase out of state cement after the July explosion and he received no complaints from customers concerning color variations after the sources of the cement were altered.

16) Stevens approached other cement suppliers, specifically Alpha and Ideal, after July of 1977, but did not contract with them because their prices wre higher than he cared to pay. The defendant did not, however, attempt to investigate the possibility of obtaining cement from other known suppliers such as Lone Star, Dundee, Missouri, Portland or RiverCement.

17) Defendant did not protest the price

increases until the filing of its counter claim on May 27, 1983.

CONCLUSIONS OF LAW

Louisiana Civil Code Article 1850 states: "Consent to a contract is void, if it be produced by violence or threats, and the contract is invalid." Article 1851 provides: "It is not every degree of violence or every kind of threats that will invalidate a contract; they must be such as would naturally operate on a person of ordinary firmness, and inspire a just fear of great injury to person, reputation or fortune. The age, sex, state of health, temper, and disposition of the party, and other circumstances calculated to give greater or less effect to the violence or threats, must be taken into consideration." Article 1855 states: "No contract can be invalidated on an allegation of violence or threats, if it has been approved, either

expressly after the violence or danger has ceased, or tacitly by suffering the time limited to elapse without causing it to be rescinded."

In Plaza Amusement Co. v. Frank Rubenstein & Co., 163 La.272, 111 So. 702 (La.1927) defendant entered into a written lease agreement with plaintiff which would allow defendant to occupy the premises on a certain date in exchange for $2,600.00. Defendant then made an oral agreement with plaintiff's agent which would allow defendant to occupy the premises on the same date for $1,600.00. Defendant expended much effort and money in contemplation of the lease and prior to occupancy, plaintiff insisted upon payment of the amount of $2,600.00. Although defendant protested, defendant agreed to pay the sum under alleged "duress". When defendant later refused to pay, plaintiff sued. The trial court granted judgment in favor of plaintiff and the Supreme Court

affirmed. The court held that the defendant entered the agreement voluntarily and that any expense borne by defendant in preparing for occupancy did not put the defendant under duress sufficient to invalidate his obligation.

In New Orleans & N.E.R. Co. v. Louisiana Constr. & Imp. Co., 109 La. 13, 33 So.51 (La. 1902), plaintiff claimed wharfage rights granted to it by city ordinances. The defendant also had wharfage rights under similar ordinances. Apparently, the defendant had the right to operate and maintain wharfs on a greater area and the plaintiff's wharfs were granted as an exception to the defendant's agreement with the city. Plaintiff had agreed to exempt its customers from wharfage fees, but upon docking these customers were informed by defendant that the fees were due to defendant. The vessels and the owners who

refused to pay were sued for the fees. Plaintiff, to prevent its customers from abandoning the use of its facilities, paid the fees for some of its customers under protest. Plaintiff then sued the defendant to recover sums allegedly paid under economic duress. The court characterized the issue as whether plaintiff had made a voluntary payment, which could not be recovered. The opinion states: "Where the parties were not on equal terms; where the payer had no choice; where the only alternative was to submit to an illegal exaction or discontinue business--these and other like circumstances evidencing pressure or duress under which money or other value is parted with have never been regarded as embraced within the rule of voluntary acts within the meaning of the maxim 'Volenti no fit injuria.' (citation omitted) But where dispute arises and the debtor, who pays under protest, has at hand other means of immediate relief than

making the payment, his act is not one done under coercion and his protest does not take the case out of the category of voluntary payment." Id at 55. The court noted that there was no evidence of unequal bargaining power between the parties concluded that plaintiff's proper means of recourse should have been to refuse payment and institute suit immediately.

Louisiana Civil Code Article 1811 states: "The proposition as well as the assent to a contract may be express or implied: Express when evidenced by words, either written or spoken; Implied, when it is manifested by actions, even by silence or by inaction, in cases in which they can from circustances be supposed to mean, or by legal presumption are directed to be considered as evidence of an assent." Article 1816 further clarifies this concept, it provides in pertinent part: "Actions without words,

either written or spoken, are presumptive evidence of a contract, when they are done under circumstances that naturally imply a consent to such contract. To receive goods from a merchant without any express promise, and to use them, implies a contract to pay the value. . ." The two articles quoted above were construed in Stupp Corporation v. Con-Plex, Division of U.S. Industries, 344 So.2d 394 (La. App. 1stCir. 1977). Con-Plex, after inquiry into Stupp's prices, sent a purchase order for steel mill products. Stupp modified the order by attaching a form which included a provision entitled "Standard Conditions of Sale." This provision stated that mill products would be billed in accordance with posted prices in effect at the date of shipment. The posted prices were subject to change without notice. Both parties signed the order and the amendment and Stupp began shipping steel. Stupp later informed all of its customers by letter that

a price increase was to take effect on February 4, 1974. Although the area manager of Con-Plex received the letter, he did not believe it applied to his firm since Con-Plex supposedly had a firm contract with Stupp. Seventeen shipments were made at the increased price without protest. In March, Stupp discontinued shipment to Con-Plex because their account was in arrears. Upon inquiry, Con-Plex's superintendent was reminded about the price increases and a check was forwarded to cover the arrearages. Shipments then resumed. Con-Plex then sent a letter to Stupp stating that the payments at the higher price had been made in error and payment on the last two invoices was to be withheld in order to recoup the overpayment. Stupp then instituted suit for the unpaid balance and Con-Plex reconvened for the alleged overpayment. The court of appeal affirmed the trial court's holding that there

had never been a binding written contract because the parties had never reached a meeting of the minds as to price. Con-Plex was nonetheless held liable for unpaid balance at the higher price because it had accepted and used the steel shipped after the price increase. The court concluded that article 1816 was applicable and that Con-Plex had tacitly agreed to purchase steel at the increased cost. See also, Ceco Corporation v. Mid-Gulf Construction, Inc., 396 So.2d 474 (La. App. 4th Cir. 1981).

In Staple Cotton Cooperative Association v. Pickett, 326 So.2d 337 (La. 1976) defendant entered into a "forward sales contract" with plaintiff by which defendant agreed to sell to plaintiff all of the cotton produced on certain farms in 1973-1974 at 30 cents a pound. When the market price for cotton during that year rose to 60 cents a pound, defendant breached its contract by refusing to deliver his cotton to plaintiff.

Plaintiff sued for specific performance. The court held that plaintiff was entitled to a judgment for specific performance both under the terms of the contract itself and as a matter of law.

If the defendant is to escape its obligation to pay for the cement delivered and used, it must establish that the escalated prices were forced upon it through duress and that there was no assent to the price increases after the duress ceased. See La. Civ. Code arts. 1811, 1850, 1851, 1855.

Louisiana has long recognized duress as a vice of consent, but the party alleging duress bears the burden of proof to show by a preponderance of the evidence that he justly felt compelled to sign the contract and that the circumstances would have compelled "other reasonable persons with the same objective characteristics" to sign. See e.g. Lewis v. Lewis, 387 So.2d 1206 (La. App.

1st Cir. 1980). The defense of duress will not be sustained when it is shown that the defendant had available other alternatives, including business and judicial options, to alleviate the threats. See New Orleans & N.E.R., supra.

Defendant founds its case for duress on the testimony of Roland Stevens, Jr. and his belief that, based on limited, unspecified inquiries, cement could not be obtained at an acceptable price. However, Stevens failed to show by a preponderance of the evidence that other reasonable persons would have been compelled to acquiesce. A reasonable person, sufficiently aggrieved, would have made a greater effort to obtain an alternative source of cement; could in fact have obtained an alternative source; and would have taken legal action against plaintiff to recover any difference in price. Stevens did not.

Even assuming, arguendo, that Stevens complied with OKC's demands under duress in

1977, by 1980 Stevens must have been aware of the increased availability of cement by nonetheless signed another contrct at a higher price without even making inquiries of other suppliers or making legal demand on OKC to honor its prior agreement. The court concludes, therefore, that Stevens actions resulted in a tacit ratification of OKC's proposal to provide cement at a higher price than provided for in earlier contracts. See Plaza Amusement, supra, La. Civ. Code arts. 1855, 1815, 1816.

In summary, not only did Stevens fail to demonstrate duress sufficient to vitiate the agreements for cement prices on July 20, 1977 and through October, 1980, but even more important, Stevens approved all prices charged following July 20, 1977, by its failure to take alternative action.

Defendant argues that its belated counterclaim is sufficient legal demand to

sustain the defense of duress. In support of its contention defendant cites Eanes v. McKnight, 251 So.2d 491, aff'd 265 So.2d 220; Dewenter v. Mott, 27 So.2d 444 (La. App. 1st Cir. 1946); Reuter v. Reuter's Succession, 206 La. 474, 19 So.2d 209 (La. 1944); Cognevich v. Blazio, 159 La. 1019, 106 So. 550 (La. 1922); Oliver v. Home Service Ice Co., 161 So. 766 (La. App. 2d Cir. 1935). All of those cases are factually so distinct from the case at hand that they are not controlling or persuasive.

Defendant further contends that its defense of duress has been asserted timely because the "duress" never ceased within the meaning of Civil Code article 1855. This argument cannot stand. Duress, in the legal sense, does not exist when the aggrieved party has other means of escaping the purported threats, see New Orleans v. N.E.R., supra; Staple Cotton, supra.

Similarly, the counterclaim is valid

only if the defendant shows that the alleged "overcharges" were paid under duress. As previously noted, defendant can hardly be heard to demand recovery of payments to which he has assented. In reality, Stevens' assent removes the "overcharges" from that category and transforms them into payment of a price agreed upon by the parties. Accordingly, the demands asserted in the counterclaims are hereby DENIED.

Defendant correctly argues that an award of attorney's fees is not appropriate under La. R.S. 9:2781 unless the suit is to recover amounts due on open account. The statute is not applicable to suits in which the object is the recovery of sums due under contracts, whether a series of contracts or one alone, see Womack Brothers, Inc. v. Equipment Rental Services, Inc., 399 So.2d 661 (La. App. 1st Cir. 1981); Jenkins v. Dicon, Inc., 387 So.2d 649 (La. App. 1st Cir. 1980); Richards v.

Gulfco Electronics Corporation, 360 So.2d 609 (4th Cir. 1978). Plaintiff's request for attorney's fees under La. R.S. 9:2781 must, therefore, be DENIED.

Accordingly, there will be judgment in favor of plaintiff in the amount of $71,336.51 with legal interest thereon from October 16, 1980 until paid.

The counterclaim of the defendant will be dismissed.

Baton Rouge, Louisiana, August 2, 1983.

JOHN V. PARKER,
CHIEF JUDGE
MIDDLE DISTRICT OF
LOUISIANA